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GENERAL COUNSEL
U. OF COPYRIGHT

April 20, 1998

APR 20 1998

VIA FACSIMILE DELIVERY

RECEIVED

Hon. Lewis Hall Griffith
Hon. Jeffrey S. Gulin
Hon. Edward Dreyfus
c/o Ms. Gina Giuffreda,
CARP Specialist
Office of the Register of Copyrights
Room LM-403
James Madison Memorial Building
101 Independence Avenue, S.E.
Washington, DC 20540

Re: Noncommercial Educational Broadcasting License (Docket No. 96-6 CARP NCBRA)

Dear Judges Griffith, Gulin and Dreyfus:

The American Society of Composers, Authors and Publishers ("ASCAP") hereby responds to the letter, dated April 9, 1998, from counsel for Public Broadcasters summarizing the latter's position with regard to their motion to strike certain ASCAP Exhibits proffered by ASCAP in its Direct Case. Those ASCAP Exhibits were sponsored by Carol Grajeda, a legal assistant employed by White & Case, counsel to ASCAP.

Annexed to Public Broadcasters' letter as "Schedule A" is a "SCHEDULE OF GRAJEDA EXHIBITS." That Schedule sets forth the current state of Public Broadcasters' objections thereto as follows:

- (a) Public Broadcasters have withdrawn their objections to ASCAP Exhibits 9, 10, 11, 12, 13, 14, 15, 16, 300, 301, 302, 304, 306, 307, 308, 309, 310, 311, 313, 316, 317, 318, 319, 320, 321, 325, 326, 327, 330, 331, 332, 333, 337, 338, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 700 and 701.
- (b) Public Broadcasters acknowledge that the following ASCAP Exhibits have already been introduced into evidence and, therefore, objections to these are, presumably, no longer at issue.

ASCAP Exhibit: 312, 500.3 through 500.8; 500.19 through 500.32, 500.51 through 500.94, 500.115 through 500.132, 500.161 through 500.162, 500.171 through 500.190, 500.213 through 500.220, 500.291 through 500.322, 500.349 through 500.392, 500.411 through 500.414, 500.441 through 500.480 [admitted as ASCAP Exhibit 6x]; 505.32 through 505.33, 505.69 [admitted as ASCAP Exhibit 1x and 13x]; 515.6 [admitted as ASCAP Exhibit 16x]; 516.14 [admitted as ASCAP Exhibit 2x]; 519.9 through 519.10 [admitted as ASCAP Exhibit 11x]; 519.14 [admitted as ASCAP Exhibit 23x]; 521.13 through 521.14 [admitted as ASCAP Exhibit 19x]; 615.9 through 615.11, 615.37 through 615.42; 615.58 through 615.71, 615.79 through 615.84; 615.100 through 615.139, 615.159 through 615.177; 615.218 through 615.258 [admitted as ASCAP Exhibit 24x];

712.15 through 712.16 [admitted as ASCAP Exhibit 12x]; 713.29 [admitted as ASCAP Exhibit 5x], 713.55 [admitted as ASCAP Exhibit 7x]

(c) Public Broadcasters move to strike solely "on hearsay grounds" the following:

ASCAP Exhibits 323, 324, 328, 335, 336, 505.1 through 505.31, 505.34 through 505.68, 505.70 through 505.79, 506 through 507, 511 at pp. 3 through 4 and 6 through 9, 513, 514.4 through 514.5, 514.12 through 514.13, 514.20 through 514.22, 515.5, 515.14, 515.16, 516.12 through 516.13, 519.50, 519.52, 520, 523, 615.1 through 615.8, 615.12 through 615.36, 615.43 through 615.57, 615.72 through 615.78, 615.85 through 615.99, 615.140 through 615.158, 615.178 through 615.217, 615.259 through 615.263, 702, 704, 710.17, 711, 714, 715, 716, 717, 718, 719, 720.16 and 720.18 through 720.19.

(d) Public Broadcasters move to strike without qualification the following.

ASCAP Exhibits 303, 305, 314, 315, 322, 329, 334, 339, 340, 341, 342, 400, 414, 500.1 through 500.2, 500.9 through 500.18, 500.33 through 500.50, 500.95 through 500.114, 500.133 through 500.160, 500.163 through 500.170, 500.191 through 500.212, 500.221 through 500.290, 500.323 through 500.348, 500.393 through 500.410, 500.415 through 500.440, 500.481 through 500.524, 501, 502, 503, 504, 508, 509, 510, 511 at pages 1 through 2 and 5, 512, 514.1 through .3, 514.6 through 514.11, 514.14 through 514.19, 514.23 through 514.39, 515.1 through 515.4, 515.7 through 515.13, 515.15, 515.17 through 515.19, 516.1 through 516.11, 516.15 through 516.28, 517, 518, 519.1 through 519.8, 519.11 through 519.13, 519.15 through 519.49, 519.51, 519.53 through 519.54, 521.1 through 521.12, 521.15 through 521.21, 522, 524, 525, 600, 703, 705, 706, 707, 708, 709, 710.1 through 710.16, 710.18 through 710.19, 712.1 through 712.14,

712.17 through 712.65, 713.1 through 713.28, 713.30 through 713.54, 713.56 through 713.59, 720.1 through 720.15, 720.17, 720.20 through 720.27.

This letter will address the objections by Public Broadcasters to those ASCAP Exhibits which are gathered together above in paragraphs (c) (those objections which are made solely on ground of hearsay) and (d) (those objections which are made generally).

II.

There is apparently no dispute as to the authenticity of any of the ASCAP Exhibits which are the subject of objections. The White & Case legal assistant, Ms. Grajeda, testified to the process by which she and others under her supervision collected the ASCAP Exhibits.

(Transcript, March 12, 1998, at 768 - 827). Public Broadcasters do not assert that these ASCAP Exhibits are, in any way, something other than what ASCAP purports them to be. Therefore, their authenticity is established.¹

The objections asserted by Public Broadcasters to the ASCAP Exhibits set forth in I(c) above are based solely on hearsay. Hearsay, however, is not a valid objection to evidence in either an arbitration such as a CARP or any other similar non-judicial proceeding. Under 17 U.S.C. § 802(c) and (d), and 37 C.F.R. § 251.42, CARP proceedings must be conducted subject to the terms of the Administrative Procedures Act, codified at Title 5, Chapter 5, Subchapter II of

¹ See Federal Rules of Evidence, Rule 901:

"The requirement of authenticity or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims."

the United States Code (the "APA"), where CARP procedures have not been otherwise proscribed by the Librarian of Congress. Under Section 556(d) of the APA, "[a]ny oral or documentary evidence may be received." 5 U.S.C. § 556(d), see Veg-Mix, Inc. v. U.S. Dep't of Agriculture, 832 F.2d 601, 606 (D.C. Cir. 1987) (holding that "[l]axer standards of admissibility . . . apply to administrative tribunals").² Evidence is to be excluded "only if it is 'irrelevant, immaterial, or unduly repetitious.'" Hoska v. U.S. Dep't of the Army, 667 F.2d 131, 138 n.12 (D.C. Cir. 1982) (quoting § 556(d) (emphasis added)); see also Bennett v. N.T.S.B., 66 F.3d 1130, 1137 (10th Cir. 1995) ("agencies are not bound by the strict rules of evidence governing jury trials"). Likewise, "[a]rbitrators are not bound by the rules of evidence." Generics Ltd. v. Pharmaceutical Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997) (citing Bernhardt v. Polygraphic Co., 350 U.S. 198, 203-04 n.4 (1956)); Hoteles Condado Beach, La Concha & Convention Center v. Union de Tronquistas Local 901, 763 F.2d 34, 38 (1st Cir. 1985) ("An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence; the arbitrator's role is to resolve disputes, based on his consideration of all relevant evidence, once the parties to the dispute have had a full opportunity to present their cases").

² Rule 251.48(a) of the CARP Rules provides that "evidence that is not unduly repetitious or cumulative and is relevant and material shall be admissible." 37 C.F.R. § 251.48(a).

Docket No. 96-6 CARP NCBRA [4/9/98]
Public Broadcasters' letter re status
Grajeda documents

Docket No. 96-6 CARP NCBRA [4/21/98]
ASCAP response to PBs' 4/9/98 letter re
status of Grajeda documents